# Customs Bulletin

**Regulations, Rulings, Decisions, and Notices concerning Customs and related matters**

# and Decisions

**of the United States Court of Customs and Patent Appeals and the United States Customs Court**

Vol. 11 MARCH 9, 1977 No. 10



*This issue contains*



DEPARTMENT OF THE TREASURY
U.S. Customs Service

## NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Logistics Management Division, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 85 cents (single copy). Subscription price: $43.70 a year; $10.95 additional for foreign mailing.

# U.S. Customs Service

(T.D. 77-69)

*Foreign currencies—Daily rates for countries not on quarterly list*

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, D.C., February 11, 1977.*

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (19 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

| | |
|---|---|
| Hong Kong dollar: | |
| February 7, 1977 | $0.2152 |
| February 8, 1977 | 0.2153 |
| February 9, 1977 | 0.2153 |
| February 10, 1977 | 0.2153 |
| February 11, 1977 | 0.2140 |
| Iran rial: | |
| February 7–February 11, 1977 | $0.0143 |
| Philippines peso: | |
| Feburary 7–February 11, 1977 | $0.1340 |
| Singapore dollar: | |
| February 7, 1977 | $0.4066 |
| February 8, 1977 | 0.4066 |
| February 9, 1977 | 0.4068 |
| February 10, 1977 | 0.4067 |
| February 11, 1977 | 0.4060 |

Thailand baht (tical):
February 7–February 11, 1977 ..... $0.0490
(LIQ-3)

JOHN B. O'LOUGHLIN,
*Director,*
*Duty Assessment Division.*

---

(T.D. 77-70)

*Foreign Currencies—Certification of Rates*

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, D.C., February 18, 1977.*

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 273(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 77-51 for the following country. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Mexico peso:

| | |
|---|---|
| February 7, 1977 | $0.0435 |
| February 8, 1977 | 0.0440 |
| February 9, 1977 | 0.0441 |
| February 10, 1977 | 0.0439 |
| February 11, 1977 | 0.0441 |

(LIQ-3)

JOHN B. O'LOUGHLIN,
*Director,*
*Duty Assessment Division.*

# Decisions of the United States Customs Court



## *Customs Decision*

(C.D. 4688)

IDEAL TOY CORP. *v.* UNITED STATES

*Inflatable floats—Toys*

The imported article, described on the invoices as "inflatable baby tender chair" or "Ideal's Baby-Me Play Float," was classified as a toy under TSUS item 737.90. Plaintiff claims the imported article is properly classifiable under the tariff provision for pneumatic mattresses and other inflatable articles, not specially provided for, dutiable under TSUS item 790.39.

Except for nuances in the differing opinions on the question of whether the "Baby-Me Play Float" is a toy or not a toy, the testimony does nothing more than cumulatively corroborate the purpose of the play float stated and depicted on the container in which

it is sold. The container shows a mother attending baby seated in the play float playing in the water.

Plaintiff's case (that the play float is not a toy, chiefly used for the amusement of children or adults) ultimately rests on the argument that the use of the play float is chiefly utilitarian because the baby does not play with the float and, for all practical purposes, the play float does nothing more than it was designed to do, support the baby in the water.

An article classified as a toy does not have to be a plaything, that is, it does not have to be played with, provided the quality of emotion induced by the article or use of the article takes on the character of frivolous amusement derived from an article which is essentially a plaything. *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, 159, C.A.D. 1022, 440 F. 2d 1384 (1971).

The record clearly establishes that the emotion induced in a child of six months to two years of age seated in the play float in the water is amusement. The child splashes the water, paddles its feet, and responds in improvised play with an interacting parent or adult. Moreover, the utility of the inflatable article in this case and the amusement associated with it are not mutually exclusive uses. The customs classification as a "toy" is cumulatively buttressed by the evidence that the play float is obviously directed to a child's fantasies; that it is called a toy, trademarked as a toy, and sold in toy departments at retail.

HELD. Plaintiff having failed to establish that the chief use of the imported play float was other than amusement, the presumption of correctness attaching to the classification by customs was not overcome.

Court Nos. 71–6–00211, etc.

Ports of New York
Baltimore
Houston
Boston
Savannah
Los Angeles

[Judgment for defendant.]

(Decided February 7, 1977)

*Sharretts, Paley, Carter & Blauvelt* (*Patrick D. Gill* and *M. Barry Levy* of counsel), for the plaintiff.

*Irving Jaffe*, Acting Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: These consolidated actions [1] involve the question of whether an inflatable article described on the invoices as "inflatable baby tender chair" or "Ideal's Baby-Me Play Float" was properly

[1] On written motions, ten actions were consolidated for trial, without objection.

classified by customs officials as a toy, dutiable under TSUS item 737.90 at various rates depending on the date of entry,[2] or should be classified as plaintiff claims, as an article of the class or kind properly classifiable under the tariff provision for pneumatic mattresses and other inflatable articles, not specially provided for, under TSUS item 790.39, also at various rates.[3]

The imported articles are one and the same article manufactured and exported from Japan. They were imported at the ports of New York, Baltimore, Houston, Boston, Savannah and Los Angeles.

Responding to the request by plaintiff for admissions, defendant has admitted that the imported articles are inflatables and concedes that if not dutiable as toys, then the inflatables are properly dutiable as inflatable articles, not specially provided for. In the context of those admissions, the only issue in this case is whether the imported inflatables are "toys." As defined in the tariff schedules (schedule 7, part 5, subpart E, headnote 2), a toy "is any article chiefly used for the amusement of children or adults." Customs officials are presumed to have found each and every fact necessary to support the presumption [4] that the chief purpose of the imported inflatables is amusement. *E. I. du Pont de Nemours & Co.* v. *United States*, 27 CCPA 146, 149, C.A.D. 75 (1939). Plaintiff's burden is to prove that the chief purpose of the inflatables is not amusement. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F.2d 1315 (1970).

The imported article is obviously intended to be utilized by a young child in the water. When inflated, the article is more square than round, and has a hole in the middle. The bottom is one piece with two leg holes that fashion the bottom into a sling-like seat. Other features include a so-called inflated backrest and an inflated handrail with two upright inflated supports all inflatedly integral. There are four variously colored rings that can be played with, that is, twirled or moved laterally on the inflated handrail. The bottom sling seat, backrest and handrail supports are a bright orange color. The top half of the inflated article is white with graphics of whimsical animals, faces, sun faces, flowers, etc. in orange, yellow, green and blue colors that obviously appeal to child-like fantasies. On the white part of the inflated article there is imprinted information that the article is an "Ideal" product "Made in Taiwan" and a warning "CAUTION Not a Life Saving Device Use With Parental Supervision." [5]

---

[2] Duty was assessed under TSUS item 737.90 at the following rates: 21% (1971) and 17.5% (1972 and post-1972).

[3] The rates of duty claimed under TSUS item 790.39 are: 7% (1971) and 6% (1972 and post-1972). Plaintiff has abandoned the claims set forth in the complaint under TSUS items 774.60 and 727.48. These claims will accordingly be dismissed.

[4] 28 U.S.C. 2635(a).

[5] Exhibit 1-A.

The imported article is sold deflated in a cardboard container [6] entitled "baby-me Play Float" that prominently depicts a picture of a mother with baby in a pool. The baby is seated in the inflated article floating on the water, the mother is standing in the water behind the baby with her hands on the backrest. Both mother and baby are smiling. The scene is obviously keyed to enjoyment.

On the front side of the container, alongside the mother and baby, is printed the following message:

> An inflatable baby seat that encourages baby to enjoy the water. Colorful foam filled vinyl rings add unlimited play. Useful head rest adds extra comfort. Safety valve out of baby's reach. This quality toy makes a perfect gift.

On the reverse side of the container are multicolored graphic of small children, pail and shovel, boat, sand, sun, bird, butterflies and flowers and a cautioning note that states:

> PLEASE NOTE:
>
> This Baby Seat provides a safe and confortable way for your baby to enjoy the water. As all responsible parents realize, a young child, unable to swim, cannot and *must* not be left entirely alone in the water. Most small children will not be able to climb out of this seat and most children will not be able to tip this. However, if they do start rocking it, and, particularly if this motion is aided by waves in the water, there is the possibility that it can be overturned. Therefore, be sure to continue your usual precautions in watching your child's activities. [Emphasis quoted.]

The record consists of the testimony from seven witnesses for plaintiff [7] and four witnesses for defendant.[8] There are ten exhibits

---

[6] Exhibit 1-B.

[7] The following witnesses testified for plaintiff:
Miriam Gittleson - executive assistant and director of the import-export department of Ideal Toy Corp.
Anthony Landi - senior vice president of Ideal Toy Corp.
Edward Engel - physical education teacher, Board of Education, City of New York.
Stewart Sims - employed by Ideal Toy Corp.
Arnold Henning - import specialist, Customs Service, New York.
David Tito - import specialist, Customs Service, New York.
Miriam Graff - employed by Sunshine Contracting Corp., Passaic, New Jersey.

[8] The following witnesses testified for defendant:
Ascher Chase - executive vice president and general manager of General Foam Plastics Corp., doing business in flotation devices for swimming pools.
Sidney Silverman - vice president of sales for Coleco Industries, *inter alia* doing business in flotation devices for swimming pools.
Sam Cynamon - field representative for safety programs, American Red Cross in Greater New York.
Dr. Joseph Church - professor of child psychology, Brooklyn College, City University of New York. Exhibit F a resume of Dr. Church's work in the field of child psychology, received in evidence without objection.

for plaintiff [9] and seven exhibits for defendant [10] in evidence.

The transcribed record of the testimony runs approximately three hundred pages. For all that, except for nuances in the differing opinions on the question of whether the "Baby-Me Play Float" is a toy or not a toy, the testimony does nothing more than cumulatively corroborate the purpose of the play float as stated and depicted on the container in which it is sold. The container shows a mother attending baby seated in the inflatable float playing in the water. There is no dispute with the fact that the baby does not play with the float so much as it plays with the water—splashes, paddles the water with its feet and generally interacts with a parent or attending adult in biplay of sorts. None of the witnesses had observed a child more than two years or less than six months old seated in the play float, and there is at least tacit agreement that in water play both adult and child are amused. I find no evidence to the contrary.

Additionally, it is plaintiff's testimony that the play float was designed for preschoolers solely as a very functional water tender type seat; that the "Baby-Me" term is registered as a trademark with the United States Patent Office in class 22 covering games, toys, and sporting goods;[11] that the play float is sold through toy stores or departments only because they get "greater traffic and, consequently, greater sales" than a baby store or department; that the term "toy," describing the play float was used merely as a "descriptive phrase" to convey a sense of enjoyment and recreation to the buyer; that the term "Play Float" is an all inclusive term conveying a sense of recreation, play ("Play is recreation. Play is enjoyment."); that the whimsical graphics on the play float are obviously geared to the fantasies of a child and that the colored rings were placed on the support bar to divert the child, and, at the same time, teach the child some color recognition.

---

[9] Plaintiff's exhibit 1-A is the imported article and exhibit 1-B is the container, *supra*.

Exhibits 2, 3, 4, 5 and 6 are photographs of a baby seated in the imported article floating in a pool, alone or with an adult, taken during a demonstration of how the article is used.

Exhibits 7, 8 and 9 are photographs, taken during the same demonstration, of an adult standing with baby seated in a flotation device in a pool. The baby is seated in the Ideal Toy Corp. "Baby-Me Love Bug Play Float" in exhibit 7, and the Ideal Toy Corp. "Baby-Me Tug Boat Play Float" in exhibits 8 and 9.

Exhibit 10 is a picture of an adult lying on a floating chaise lounge, at page 21 of defendant's exhibit D.

[10] Defendant's exhibit A is a photocopy of Ideal Toy Corp. registered trademark for "Baby-Me" inflatable floats, in class 22 for games, toys and sporting goods. 37 C.F.R. 6.2.

Exhibit B is restricted to pages 6, 16 and 17 of Ideal Toy Corp. 1972 catalogue depicting the imported inflatable article and various other inflatable articles for use in water recreation.

Exhibit C is a noninflatable flotation ring with a sling-like seat, sold by General Foam Plastics Corp.

Exhibit D is a General Foam Plastics Corp. 1975 catalogue, limited to page 22 depicting scenes of babies seated in devices like exhibit C, floating in the water under the eye of an adult.

Exhibit E consists of page 23 of the 1973 Coleco Industries catalogue, *inter alia* depicting a "Yogi Bear Head Ring" to keep "little dippers" heads up out of the water; a "Six Panel Ring" (i.e., six colored panels) flotation device, and a simulated canoe flotation device.

Exhibit F is a resume of Dr. Church's qualifications.

[11] 37 C.F.R. 6.2.

On this record, the only question left open to the differing opinions of the witnesses is whether the "Baby-Me Play Float" is a toy. The opinion testimony addressed to that question is divided. I weigh the testimony to be about equal, that is, no stronger for plaintiff than for defendant. Plaintiff's witnesses opined that the purpose of the float was to support the baby and get the baby into the water; that the baby's amusement, alone or interacting with an attending adult, was induced by play with the water and not with the float as such. For that reason, they testified that the play float was not a toy. None of defendant's witnesses had observed a child seated in the imported play float in the water, but all had observed children at play in the water with similar types of articles. In sum, defendant's witnesses testified that the play float was a toy because it was the vehicle that enabled the baby to amuse itself in the water, alone or interacting with an adult who would also be amused.

Defendant contends that plaintiff has not overcome the presumption that, as classified, the play float is a toy. In support, defendant argues that plaintiff has failed to produce any evidence that the use of articles of the class or kind to which the play float belongs, to wit, water inflatables that are used and played with in the water, *cf. Davis Products, Inc., et al.* v. *United States*, 65 Cust. Ct. 367, C.D. 4105 (1970); *Same* v. *Same*, 60 Cust. Ct. 68, C.D. 3262, 279 F. Supp. 448 (1968), are not chiefly used for the amusement of children or adults.

Plaintiff's case ultimately rests on the argument that the purpose of the play float is chiefly utilitarian because the baby does not play with the float and, for all practical purposes, the play float does nothing more than it was designed to do, support the baby in the water.

I am not going to gainsay that a float that is designed to support a baby in the water does not serve some practical or utilitarian purpose. A baby is not old enough to appreciate the utility, but an attending adult is. It is a fact, however, that the play float also incorporates features that have no utility and the play float is "obviously for a child." When amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purpose incidental to the amusement. *United States* v. *Globe Overseas Corporation*, 13 Ct. Cust. Appls. 10, T.D. 40849 (1925); *compare*, *H. Boker & Co. (Inc.)* v. *United States*, 19 Ct. Cust. Appls. 27, 29, T.D. 44870 (1931). Moreover, the utility of the inflatable article in this case and the amusement associated with it are not, in my opinion, mutually exclusive uses. On the record, I conclude that plaintiff has failed to overcome the presumption that the play float is chiefly used for the amusement of children or adults.

At the outset, plaintiff concedes that to be a toy, an article does not have to be a plaything, that is, it does not have to be played with, provided the quality or emotion induced by the article or use of the article takes on the character of frivolous amusement derived from an article which is essentially a plaything. *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, 159, C.A.D. 1022, 440 F. 2d 1384 (1971); *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967) ("papier mache dogs" and "papier mache ware" for display or ornamentation held not dutiable as toys).

The merchandise in *Topps Chewing Gum, Inc.* consisted of objects variously labeled as "Wise Guy Buttons," "Smarty Buttons" and "Ugly Buttons." Each of the objects consisted of a round metal disk about two inches in diameter with a metal pin attached to the back. Humorous sayings and/or designs were printed in color on the front of the objects. Customs officials classified the objects as toys, not specially provided for. The Customs Court found that the objects were designed to be worn rather than played with; that the chief use was for wearing, and held that the objects were, accordingly, properly classifiable as buttons of metal. On appeal, the Court of Customs and Patent Appeals reversed the Customs Court stating:

> The court concluded from the evidence that the chief use of the imported objects was "wearing." We have no quarrel with that conclusion. Where we differ with the court below is in its reasoning that "wearing" and "amusement" are mutually exclusive. The court reached this result through an unduly narrow construction of the term "amusement." After noting that prior to the enactment of the TSUS a "toy" was defined as a child's plaything, the court cited *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967), for the proposition that the TSUS removed the limitation regarding the users' age but left the requirement that the object be a plaything. We think this conclusion is unsupported by the wording of the TSUS or by case authority. In the *Wilson's* case the court did not hold that to be a toy an object had to *be* a plaything, but that the "character of amusement involved was that derived from an item which is essentially a plaything." *Id.* at 39. The court thus stressed the quality of mind or emotion induced by the object as controlling, and we think that is the best approach to interpreting the TSUS definition. If the purpose of an object is to give the same kind of enjoyment as playthings give, its purpose is amusement, whether the object is to be manually manipulated, used in a game, or, as here, worn. We think the evidence is clear that the fun children derive from wearing the imported buttons is essentially the same kind of frivolous enjoyment they would derive from objects which we commonly think of as toys. Accordingly, we find that the importer failed to establish that the chief use of the imported buttons was other

than amusement. The presumption of correctness of the Collector's classification was therefore not overcome. [58 CCPA at page 159.]

The record in this case establishes that the emotion induced in a child of six months to two years of age seated in the play float in the water is amusement. The child spashes the water, paddles its feet and responds to improvised play with an interacting parent or adult. The utility of the play float is that it does tend to support the child in the water. That support is not, however, unqualifiedly a safe support, because by "rocking it" there is "the possibility that it can be overturned." (Exhibit 1–B.) I have to believe that the utility of a play float, obviously for a child, bearing warning that it can be overturned by "rocking it" is suspect. Use of the play float by a child in the water, unattended by a parent or adult, is not recommended. It strikes me, therefore, that the prime motivation for a parent or an adult seating the child in the play float in the water is to amuse the child, and not the qualified utility of the play float, to safely support the child. As one witness testified, one essence of a child's enjoyment is movement, and the sensation of floating in the water would itself tend to amuse a child. The customs classification as a "toy" is also cumulatively buttressed by the evidence that the play float is obviously directed to a child's fantasies; that it is called a toy, trademarked as a toy (it is not a game or sporting equipment), and sold in toy departments at retail.

Plaintiff having failed to establish that the chief use of the imported play float was other than amusement, the presumption of correctness attaching to the classification by customs was not overcome, and these consolidated actions [12] are dismissed.

Judgment will enter accordingly.

---

[12] Schedule A lists the court actions, protests and entries covered by the complaints in these consolidated actions.

Schedule B covers the disposition of protests identified in the summons commencing the consolidated actions which plaintiff failed to prosecute by complaint.

Schedule C, *inter alia*, reflects the disposition of affirmative defenses recited in defendants' answers to the complaints in the consolidated actions admitted by plaintiff.

All the schedules are attached to and made a part of the decision and judgment in these consolidated actions.

# Decisions of the United States Customs Court

## *Customs Rules Decision*

(C.R.D. 77–3)

FORTUNE STAR PRODUCTS CORP. *v.* UNITED STATES

*On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment*

Court No. 72–7–01497

Port of New York

[Motions denied.]

(Dated February 11, 1977)

*Siegel, Mandell & Davidson* (*Brian S. Goldstein* of counsel) for the plaintiff.
*Irving Jaffe*, Acting Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

MALETZ, Judge: This case concerns the proper tariff classification of merchandise invoiced as "Eskimo Doll Radios" that was imported from Japan via the port of New York. The sample consists of a figure of a human baby, having a head, arms and feet composed of a soft rubbery material. It has brown hair and is clothed in a soft, plush, blue and white outfit with a hood made of the same material. The figure is approximately 13 inches high and 10 inches wide with arms extended. It cannot stand or sit up unsupported.

Protruding on the back portion of the body are two black radio knobs, one of which serves as an on/off switch and volume control for a battery-powered transistor radio which is housed inside the body. A similar protruding black knob about 1 inch adjacent to the first knob is the station selector. Recessed in a zippered compartment in the rear interior of the body is the transistor radio (with dimensions of about 3″ by 2¼″ by 1″) which is connected to a radio speaker about

2 inches in diameter located in the front interior. The parties agree that the merchandise is not a combination article but rather is an entirety for tariff purposes.

The imported merchandise was classified by the government as "dolls" under item 737.20 of the tariff schedules, as modified by T.D. 68–9, and assessed duty at the rate of 24% or 21% ad valorem, depending upon the date of entry.

Plaintiff claims that the merchandise is properly classifiable under item 685.23, as modified by T.D. 68–9, as a solid-state (tubeless) radio receiver and should be assessed with duty at the rate of 11% or 10.4% ad valorem, depending upon the date of entry. Alternatively, plaintiff claims that the merchandise is more than a doll and more than a radio and is thus classifiable under item 688.40, as modified by T.D. 68–9, as an electrical article, not specially provided for, dutiable at the rate of 8% or 6.5% ad valorem, depending on the date of entry.[1]

Quoted below are the relevant provisions of the Tariff Schedules of the United States (19 U.S.C. 1202, as modified by Pres. Proc. 3822, T.D. 68–9, 82 Stat. 1455):

Schedule 7, Part 5, Subpart E. — Models; Dolls, Toys, Tricks, Party Favors

Subpart E. headnotes:

1. The articles described in the provisions of this subpart (except parts) shall be classified in such provsions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules, . . .

* * * * * * *

| Classified under: | | |
|---|---|---|
| 737.20 | Dolls, and parts of dolls including doll clothing | 24% or 21% ad val. [depending on date of entry] |
| Claimed under: | | |
| | Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dicta- | |

[1] Defendant has claimed in the alternative that the merchandise is properly classifiable as toys, not specially provided for, dutiable under item 737.90 at the rate of 24% or 21% ad valorem, depending on the date of entry. However, defendant adds—and the court agrees—that this alternative claim need not be considered for purposes of the present cross-motion, in view of the greater specificity of the original government classification.

| | | |
|---|---|---|
| | tion recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof: | |
| * * * * * * * | | |
| | Other: | |
| 685.23 | Solid-state (tubeless) radio receivers | 11% or 10.4% ad val. [depending on date of entry] |
| Alternatively claimed under: | | |
| 688.40 | Electrical articles, and electrical parts of articles, not specially provided for | 8% or 6.5% ad val. [depending on date of entry] |

The essential issue in this setting is whether the imported article is a "doll," as classified, or is more than a doll, as claimed by plaintiff. On this issue, plaintiff contends that *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F.2d 1315 (1970) is dispositive here. In *New York Merchandise* the imported article consisted of a stuffed, plush-covered poodle dog, about 12 inches in overall length, and containing in a concealed, zippered compartment a battery-powered transistor radio which was operated by control knobs protruding out from the nose and chest parts of the stuffed animal. The government classified the article under item 737.30 of the tariff schedules as a stuffed toy figure of an animate object and assessed duty at 18% ad valorem. The appellate court affirmed the decision of this court, sustaining the protest and holding that the importation was "more than" a toy figure of an animate object and that it was properly classifiable under item 685.22 as a radio dutiable at 12½%. See *New York Merchandise Co., Inc.* v. *United States*, 62 Cust. Ct. 283, C.D. 3746, 305 F. Supp. 25 (1969). The court concluded that the poodle dog figure was more than a toy figure of an animate object on the basis that the main commercial value of the article was derived from the radio component and that the radio contributed substantially to the uniqueness and value of the entire article. In reaching this conclusion, the court regarded the following facts in addition to the sample as determinative: The radio portion of the imported article constituted the component of chief value of the entire article; the wholesale price for the imported

article was approximately three times that of comparable stuffed animals sold by the importer as toys for children; the federal excise tax applicable to radios was paid upon sale of the imported article; between 1965 and 1966 more than 140,000 of these articles were imported and sold through gift shops or department stores where they were displayed on counters with radios and other electric articles and were advertised and sold as "novelty radios." See *United States* v. *New York Merchandise Co., Inc., supra*, 58 CCPA at 55–56.

With these considerations in mind, plaintiff contends that the merchandise in the present case is similar in all material respects to the merchandise in *New York Merchandise* and that the present merchandise should accordingly be classified under item 685.23 as other solid-state (tubeless) radio receivers, as claimed. More particularly, plaintiff insists that as in *New York Merchandise* the main commercial value of the article was derived from the radio component and that the radio component contributed subsequently to the uniqueness of the entire article (as opposed to defendant's argument that the radio component was merely an incidental part of the whole product). To support its contention, plaintiff has submitted an affidavit by George Gluck, corporate secretary and executive officer of the plaintiff-importer, which position he has held since 1960. To the extent relevant, Gluck attests in his affidavit that plaintiff has been in existence since 1950 and has imported and sold such items as consumer electronics articles, lighters, umbrellas, etc.; that throughout the period he has been with the company his duties have included the purchase, importation and sale of these articles, including the Eskimo Doll Radio; that "*based upon my personal knowledge of the costs associated with the production of our imported products, the predominant cost factor for the imported article is attributable to the radio and not the stuffed figure exterior*" (emphasis added); and that the "main commercial value of the article is derived from the radio component which contributes substantially to the uniqueness and value of the entire article."

Continuing, Gluck states in his affidavit that his company has sold the imported item through jewelry stores, department stores, electronics outlets and novelty outlets where it was sold with other radios and similar merchandise; that the item has always been considered in the electronics home-products field as a novelty radio; and is of a class of radio which includes such items as "puppy radios" and "poodle dog radios" as represented in plaintiff's catalogue.

Finally, Gluck attests that he does not consider that the article in question falls within the broad understanding of the term "doll"; that it is his opinion, based on years of experience in the purchase, sale and use of novelty radios, that the article in question is not chiefly

used for amusement of children or adults; and that, rather, he considers the item to be a novelty radio.

One of the factors supporting the outcome of the *New York Merchandise* case was that the parties had stipulated that the radio portion was the component in chief value of the overall poodle dog radio. Also, additional information as to the price aspect was provided by a company which assembled and distributed similar animal radios. Plaintiff herein attempts to prove the same set of facts by statements made by its affiant, Gluck, which, however, do not constitute factual proof. Plaintiff is *not* the manufacturer of the merchandise, yet the affiant claims that he has "personal knowledge of the costs associated with the production of our imported products." Lacking is any basis shown in the affidavit for Gluck's asserted personal knowledge that "the predominant cost factor for the imported article is attributable to the radio and not the stuffed figure exterior." He does not state that he has ever discussed the manufacturer's actual costs or that he had any responsibility for manufacturing, processing or purchasing the materials that make up the Eskimo Doll Radio. No cost details are delineated and no records were produced in support of the affidavit.

Rule 8.2(f) of this court requires that affidavits offered in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The lack of documentation, cost details, and explanation, as to the basis of Gluck's knowledge of the costs of the various component materials and parts of the merchandise, is a fatal defect in the affidavit. As a result, his affidavit cannot be given any weight in resolving the crucial question as to the predominant cost factor of the merchandise. See *Beck Distributing Corp.* v. *United States*, 77 Cust. Ct.—, C.R.D. 76–7 (1976). *Cf. Jimlar Corp.* v. *United States*, 77 Cust. Ct.—, C.R.D. 77–2 (1977).[2] Nor can it be determined by an examination of the sample alone whether the radio is or is not an incidental feature of the article. In other words, reliance on the sample itself is not helpful in resolving the question as to whether for tariff purposes the importation is a doll or more than a doll. For the foregoing reasons, plaintiff's motion for summary judgment must be denied.

We turn now to defendant's cross-motion for summary judgment in support of which it has submitted the affidavits of two individuals who have been employed in the doll business for a number of years.

[2] In view of the defectiveness of the affidavit in this major respect, it is unnecessary to reach the question as to whether or not the affidavit has any probative weight on the question as to whether the imported articles were in fact merchandised and sold as "novelty" radios. See *United States* v. *New York Merchandise Co., Inc., supra*, 58 CCPA at 56.

Thus, an affidavit by Will Goldsmith of New York states that he has been employed in the doll business for the past 30 years; that for the past 5 years he has been assistant sales manager for a firm manufacturing dolls; and that prior to that he served as a national account executive for another doll manufacturer after holding the position for 5 years as sales manager for yet another doll manufacturer. Goldsmith declared in his affidavit that he was personally familar with the doll industry and with all types of merchandise marketed as dolls; that he has examined the sample in the present case; that in his opinion the sample possesses all of the characteristics necessary to be considered a doll as that term is known in the trade "and is in fact a doll, within the common meaning of that word." Goldsmith's affidavit goes on to state that it is his "further opinion that the inclusion of the radio in this item does not make the item more than a doll"; and that dolls may incorporate additional novelty features (such as tears, voices, phonographs, etc.) which do not deter from the doll's primary purpose and function of being a doll. Finally, Goldsmith attests that it is his further opinion, based upon the knowledge of the marketing of dolls, that the sample would be chiefly used for the amusement of children.

Rose Chais, defendant's second affiant, attests in her affidavit that she has worked in the doll business for over 25 years during all of which time she has been employed by the New York Doll Hospital, New York City; that her duties at that hospital involve appraising and repairing dolls of all kinds and acting as a seller-buyer of antique dolls. The affiant states that she has examined the sample involved here and has concluded that since it has arms, legs and hair it is a doll; that the presence of the radio does not make it something other than a doll since a doll "can have anything one wants to put inside it and still be a doll"; and that the primary use of the sample is a slumber doll to put children to sleep.

Assuming arguendo that the two foregoing affiants were competent to testify to the matters stated in their affidavits and that their opinions would be admissible in evidence (which is highly doubtful) it is obvious that their opinions that the importations come within the common meaning of the term "dolls" are totally inappropriate and can be given no probative weight. For the common meaning of a tariff term is a question of law and an affidavit is no place for opinions—such as here contained—for conclusions of law. See 6 Moore's *Federal Practice* (2d ed. 1976) pp. 56–1312 – 56–1318. In these circumstances, defendant's cross-motion for summary judgment must also fail.

To sum up, both plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are denied.

# Decisions of the United States Customs Court

## *Abstracts*

## *Abstracted Protest Decisions*

DEPARTMENT OF THE TREASURY, *February 14 1977.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
*Commissioner of Customs.*

| DECISION NUMBER | JUDGE & DATE OF DECISION | PLAINTIFF | COURT NO. | ASSESSED | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|---|---|---|---|---|---|---|---|
| | | | | Par. or Item No. and Rate | Par. or Item No. and Rate | | |
| P77/3 | Richardson, J. February 8, 1977 | Samuel Brilliant Co. | 69/26185, etc. | Item 700.53 37.5% | Item 700.60 20% | Agreed statement of facts (submitted in court) | Boston Footwear (stock no. 240) |
| P77/4 | Ford, J. February 9, 1977 | F. W. Myers & Co. | 67/49584 | Item 692.35 11.5% | Item 692.06 Free of duty | Agreed statement of facts | Port Huron (Detroit) Automobile trucks valued at $1000 or more, used for transport; Canadian articles |

# Decisions of the United States Customs Court

## *Abstracts*

## *Abstracted Reappraisement Decisions*

| DECISION NUMBER | JUDGE & DATE OF DECISION | PLAINTIFF | COURT NO. | BASIS OF VALUATION | HELD VALUE | BASIS | PORT OF ENTRY AND MERCHANDISE |
|---|---|---|---|---|---|---|---|
| R77/7 | Richardson, J. February 9, 1977 | Drexel Motors, Inc. | 72-9-01906 | Cost of production. | Appropriate value listed in column designated "Claimed Value" on schedule attached to decision and judgment, for each automobile model | U.S. v. F & D Trading Corp. (C.A.D. 1089) | New York Various model BMW automobiles |
| R77/8 | Richardson, J. February 9, 1977 | F & D Trading Corp. | R65/22774, etc. | Cost of production. | Appropriate value listed in column designated "Claimed Value (In Deutsch Marks Per Car)" on schedule attached to decision and judgment | U.S. v F & D Trading Corp. (C.A.D. 1089) | Jacksonville (Tampa) Various model Volkswagen automobiles |

**Judgment of the United States Customs Court in Appealed Case**

FEBRUARY 7, 1977

APPEAL 76–4.—United States *v.* Rembrandt Electronics, Inc.—TELEVISION ANTENNA SWITCHES—ELECTRICAL SWITCHES—PARTS OF TELEVISION RECEPTION APPARATUS—TSUS.—C.D. 4613 reversed October 21, 1976. C.A.D. 1175.

---

**Appeal to United States Court of Customs and Patent Appeals**

APPEAL 77–13.—United States *v.* Associated Metals & Minerals Corp.—FLUORSPAR—CALCIUM FLUORIDE CONTENT—CONFLICTING LABORATORY TESTS—TSUS. Appeal from C.D. 4677.

In this case an entry of fluorspar was assessed with duty at $8.40 per ton under item 522.24, Tariff, Schedules of the United States, as fluorspar containing not over 97% by weight of calcium fluoride. Plaintiff-appellee claimed that the fluorspar was properly dutiable at $2.10 per ton under item 522.21 as fluorspar containing over 97% by weight of calcium fluoride. The Customs Court found that the evidence offered by plaintiff was more persuasive than the evidence offered by defendant-appellant in being more definite as to the sampling method used, and in relying on the results of more than one testing method in three independent laboratories to support its claim of calcium fluoride content in excess of 97%. Accordingly, plaintiff's claim for classification under item 522.21 was sustained.

It is claimed that the Customs Court erred in finding and holding that the imported fluorspar is properly classifiable under item 522.21, *supra;* in not finding and holding that it is properly classifiable under item 522.24, *supra;* in finding and holding that the fluorspar contained over 97% by weight of calcium fluoride; and in finding and holding that the presumption of correctness has been overcome.

# Index

## U.S. Customs Service



## Customs Court

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

POSTAGE AND FEES PAID
DEPARTMENT OF THE TREASURY (CUSTOMS)
(TREAS. 552)


U.S. GOVERNMENT PRINTING OFFICE: 1977